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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1114

THE PEOPLE OF THE STATE OF CALIFORNIA and the PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*,

vs.

SOUTHLAND ROYALTY COMPANY, *et al.*, TEXACO INC., EXXON CORPORATION, and MOBIL OIL CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

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No.

THE PEOPLE OF THE STATE OF CALIFORNIA and the PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners,*

vs.

SOUTHLAND ROYALTY COMPANY, *et al.*, TEXACO INC., EXXON CORPORATION, and MOBIL OIL CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 13, 1976.

OPINIONS BELOW

The judgment of the Court of Appeals is printed in Appendix A. The opinion of the Court of Appeals

is not reported yet and is printed in Appendix B. The Federal Power Commission's (Commission) Declaratory Opinion and Order on Termination of Long-Term Leases, Opinion No. 737, in the joint hearing of *El Paso Natural Gas Company,* Docket No. CP75-209 and *Texaco Inc.,* Docket No. CI75-594 is not yet reported and is printed in Appendix C. The Commission's Opinion and Order Denying Rehearing but Adopting Per Curiam, Opinion No. 737-A in Dockets Nos. CP75-209 and CI75-594, issued September 3, 1975 is not yet reported and is printed in Appendix D. The Commission's Opinion and Order Granting Rehearing on Limited Issue Relating to Filing Requirements, Opinion No. 737-B in Dockets Nos. CP75-209 and CI75-594, issued on December 18, 1975 is not yet reported and is printed in Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1976. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 19(b) of the Natural Gas Act, 15 U.S.C. Sec. 717r(b).

QUESTION PRESENTED

Whether the Commission, pursuant to the Natural Gas Act,[1] can require reversionary mineral interest owners of certain gas producing lands to obtain

[1]Natural Gas Act of June 21, 1938, 52 Stat. 821, as amended, 15 U.S.C. Section 717, *et seq.*

abandonment authorization before they can terminate sales of a continuing flow of natural gas for resale in interstate commerce when the initial interstate dedication of the gas was made by leaseholders of 50-year fixed-term leases that have expired.

STATUTORY PROVISIONS INVOLVED

Involved here are provisions of the Natural Gas Act, 15 U.S.C. Sections 717-717w. Resolution of the issues presented turns especially upon Sections 7(b), (c), and (e), 15 U.S.C. Section 717f(b), (c) and (e). These provisions are set forth in Appendix F.

STATEMENT OF THE CASE

This case involves Opinions Nos. 737, 737-A and 737-B issued by the Commission on July 11, 1975, September 3, 1975 and December 18, 1975 respectively, in Dockets Nos. CP75-209 and CI75-594. On January 20, 1975, El Paso Natural Gas Company (El Paso) filed a petition for a declaratory order from the Commission requesting that the Commission decide whether Southland Royalty Company, *et al.,*[2] reversionary mineral interest owners of gas producing property formerly subject to a 50-year oil and gas lease, could cease deliveries to El Paso of gas currently being sold for resale in interstate commerce without prior abandon-

[2]Present owners of this reversionary mineral interest include Southland Royalty Company, Exxon Corporation, Mobil Oil Corporation, trustees under the will of Warren Wright and over 100 owners of small percentages.

ment approval of the Commission pursuant to Section 7(b) of the Natural Gas Act, 15 U.S.C., Section 717f(b).

On April 8, 1975, Texaco Inc. (Texaco), filed a similar petition for a declaratory order with the Commission. Texaco is involved in a fact situation identical to Southland Royalty Company. Texaco phrased its question to the Commission differently from El Paso, however. It requested that the Commission decide whether Gulf Oil Corporation (Gulf), a lessee of Texaco's property, could commit more than its interest under the lease to interstate commerce and by so doing place all reversionary interests within the ambit of Section 7 of the Natural Gas Act so as to require abandonment authorization from the Commission.

Both proceedings involve the termination of a 50-year oil and gas lease and the reversion of the mineral interest rights in the property to the reversionary mineral interest owners. On July 14, 1925, Gulf Production Company (predecessor to Gulf) executed an oil and gas lease with W. N. Waddell, *et al.*, by the terms of which Gulf obtained the exclusive right to produce and sell oil and gas on a tract of land in Crane County, Texas, for a term of fifty (50) years. Gulf made percentage type sales of gas produced from the Crane County lease to Warren Petroleum Company (Warren), now a division of Gulf.[3] Pursuant to two residue gas purchase contracts dated January 26, 1951 and March 1, 1972, Gulf sold gas for resale in inter-

[3]Gulf's Warren Division hereafter will be referred to as Gulf.

state commerce to El Paso at the tailgate of Gulf's Waddell Gasoline Plant. These sales were certificated by the Commission on February 24, 1958 (Docket No. G-13445) and August 7, 1973 (Docket No. CI72-760). When the 50-year period of the lease expired on July 15, 1975, Southland, *et al.*, the reversioners, obtained unconditional title to the mineral estate underlying the Waddell lease and announced their intention to sell the gas produced on this property in intrastate commerce.

On August 7, 1925, Gulf, as lessee, executed a 50-year fixed term oil and gas lease with Goldsmith, *et al.*, by which Gulf obtained exclusive mineral rights in certain property in Ector County, Texas. On May 4, 1929, Texaco acquired a one-fourth interest in the reversionary mineral estate of the property subject to this lease. Gulf sold gas under the Goldsmith lease to Phillips Petroleum Company (Phillips) under a percentage-type casinghead gas sales contract, and Phillips processed the Ector County gas at its Goldsmith Gasoline Plant and sold the residue gas to El Paso pursuant to certificates issued by the Commission. On August 7, 1975, this lease expired and the mineral rights reverted to the reversionary mineral interest owners, including Texaco. These reversionary mineral interest owners also indicated an intent to sell gas produced on the Ector County property in intrastate commerce.

On July 11, 1975, the Commission issued Opinion No. 737, holding, *inter alia*, that neither Southland, *et al.*, nor Texaco, *et al.* could sell the gas in intra-

state commerce without prior abandonment authorization by the Commission pursuant to Section 7(b) of the Natural Gas Act.

Applications for rehearing were filed and on September 3, 1975, the Commission issued Opinion No. 737-A denying rehearing and again holding that Southland, *et al.* and Texaco, *et al.*, would be required to obtain abandonment authorization under Section 7(b).

Petitions for review of Opinions Nos. 737 and 737-A were filed by Southland, *et al.*, Texaco Inc., Exxon Corporation, and Mobil Oil Corporation in the U.S. Court of Appeals for the Fifth Circuit.

On November 25, 1975, pursuant to a motion by the Commission and on consent of the parties, the record was remanded for further consideration of the necessity of certificate and rate filings by the reversionary mineral interest owners pending the outcome of this litigation. On December 18, 1975, the Commission issued Opinion No. 737-B which eliminated these filing requirements and on February 2, 1976, returned the record to the Court of Appeals.

On September 22, 1975, California filed its petition to intervene in the consolidated cases before the Court of Appeals in Dockets Nos. 75-3373, 75-2851, 75-3682, 75-3819 and 75-4001 *(Southland Royalty Company, et al., v. Federal Power Commission)* which was granted by the court below. California is directly affected by the outcome of this case. El Paso is the source of approximately 70 percent of California's gas supply. The supplies of natural gas to California consumers have been steadily declining since 1972. This has caused the curtailment of natural gas to low priority customers in California. In the instant case, 25,000 Mcf per day of natural gas has been sold by Gulf to El Paso under the lease at the Waddell Gasoline Plant and 18,000 Mcf a day of gas has been sold to El Paso by Phillips from the Goldsmith plant. The loss of this significant amount of gas to the El Paso system will directly impact the supply available to California consumers.

The matter was briefed by the parties and oral argument was heard on August 3, 1976.

The Court of Appeals, by opinion issued December 13, 1976, reversed the orders of the Commission under review. The Court of Appeals held that, since Gulf never was possessed of rights in the gas under the leasehold lands which could survive the termination of its 50-year leases, it never could create rights in a third person to the same gas. The Court of Appeals agreed with the petitioners below that the case should be analyzed as purely a real property law question. Early in its opinion the Court of Appeals stated: "The challenge presents this significant property rights vs. regulatory powers issue: . . .".

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals creates serious problems in the scheme of regulation of the sale for resale and transportation of natural gas in interstate commerce. Broadly, the decision of the court

below affects the authority of the Commission to enforce the abandonment provisions of Section 7(b) of the Natural Gas Act, which is so critical to the protection of the public interest. Specifically, it allows the petitioners in the court below, reversionary mineral interest owners of the subject gas leases, to abandon the sale of natural gas in interstate commerce without having to apply for abandonment authority from the Commission. As will be shown below, this decision also will have ramifications far beyond this instant fact situation. It will affect the Commission's authority in dealing with many different kinds of legal arrangements used by natural gas producers and sellers.

This Court, in a line of cases involving Section 7(b) of the Natural Gas Act, has consistently given the broadest interpretation to that section holding that once gas is dedicated to interstate commerce there can be no withdrawal of that supply from continued interstate movement without Commission approval. This Court has additionally stressed the important public interest considerations that must be weighed in the abandonment of interstate service and the need to develop these considerations in the abandonment proceeding before the Commission.

In recent times, it has become apparent that there is a severe shortage of natural gas in the United States with a higher demand than the supply available. This has caused such drastic measures as the curtailment of natural gas to certain categories of customers. Along with this shortage has come un-

precedented escalations in the price of natural gas in intrastate commerce. The interstate price of natural gas has remained relatively stable under Commission regulation. While this price has recently been increased, it is still lower than the intrastate price. This fact was recognized by the court below. These economic conditions make it advantageous to challenge the abandonment requirements of the Natural Gas Act so that gas can be sold in intrastate commerce.

The decision of the court below is contrary to this Court's interpretation and rulings concerning the Natural Gas Act especially the all important abandonment provisions therein. If allowed to stand it could seriously hinder the operation of the Natural Gas Act. It is not in the public interest to allow the requirements of Section 7(b) of the Natural Gas Act to be so easily avoided. There is a definite need for stability in the interstate gas market which must be protected. The danger of exploitation of gas consumers in the area of rates and service has long been recognized by this Court.

The petitioners in the court below, Southland Royalty Company, *et al.*, Exxon Corporation, Texaco Inc. and Mobil Oil Corporation, have argued that this case is of limited significance because the 50-year fixed-term leases in issue here are no longer prevalent in the industry. California emphatically disagrees with the statement that this case is of limited significance.

Currently, the Commission in three separate proceedings involving almost identical facts has ordered

the continuation of jurisdictional sales in interstate commerce that had been made prior to the expiration of leases to which reversionary mineral interest owners had succeeded.[4] These cases all involve fixed-term leases and in all of the cases the final order of the Commission awaits the outcome of this case.

More importantly, however, this case brings into issue the basic tenet underlying Section 7(b) of the Natural Gas Act. The Commission has taken the position, based on decisions of this Court, that the Natural Gas Act applies to the supply of gas dedicated to interstate commerce, not to the amount of gas under contract[5], or lease[6] or even one portion of a production area[7].

The decision of the Court of Appeals brings that position into serious question and directly affects

[4]The cases pending before the Commission that are awaiting the outcome of this case are *Mineral Interest Owners,* Docket No. CI76-587, Order Maintaining Service *Pendente Lite* and Granting Protective Order, ____ FPC ____, issued July 6, 1976; Order Denying Rehearing, ____ FPC ____, issued September 3, 1976; the combined cases of *Dore Corporation,* Docket No. CS76-639, *Sullivan-Wells Company,* Docket No. CS76-640, and *Briercrest Oil Company,* Docket No. CS76-762, Findings and Order After Statutory Hearing Denying Small Producer Certificates of Public Convenience and Necessity, ____ FPC ____, issued September 8, 1976; and the combined cases of *Kerr-McGee Corporation, et al.,* Docket No. CI76-405, *Briercrest Oil Company,* Docket No. CI76-396, *Dore Corporation, et al.,* Docket No. CI76-315 and *Sullivan-Wells Corporation,* Docket No. CI76-316, Order Denying Rehearing, Granting Interventions Clarifying Orders, and Denying Motion, ____ FPC ____, issued May 7, 1976.

[5]*Sunray Mid-Continent Oil Co. v. FPC,* 364 U.S. 137, 4 L.Ed. 2d 1623, 80 S.Ct. 1392 (1960).

[6]*Mineral Interest Owners, supra,* Docket No. CI76-587, Order Maintaining Service *Pendente Lite* and Granting Protective Order, ____ FPC ____, issued July 6, 1976.

[7]*Mitchell Energy Corporation v. Federal Power Commission,* 533 F.2d 258 (5th Circuit 1976).

other types of arrangements. The Court of Appeals cited *El Paso Natural Gas Co. v. Perry R. Bass,* 48 FPC 1269 (1972), in which the Commission found that a royalty interest owner of gas that converted its royalty interest into a one-half working interest need not apply for abandonment authorization under Section 7(b). However, that case was limited by the Commission in its decision under appeal here and was subsequently completely overruled by the Commission in *Phillips Petroleum Company,* Docket No. CI76-68, Opinion No. 750, Opinion and Order Denying Rehearing, issued January 28, 1976. In the *Phillips Petroleum Company* case and in a line of decisions issued thereafter[8], the Commission required an abandonment application where a royalty interest owner converted its interest into a working interest. These cases involve the very relevant issue of the rate at which the natural gas may be sold in interstate commerce. If the working interest is considered as new gas, it could be sold in interstate commerce under a different and higher rate structure than that which applied under the royalty agreement.

In another fact situation recently before the Commission a lessor royalty interest owner had the option of terminating a gas lease if higher royalty payments

[8]Order Denying Rehearing issued February 24, 1976 in *Atlantic Richfield Company,* Docket No. CI76-50, and *Marathon Oil Company,* Docket No. CI76-195, ____ FPC ____; Order Denying Rehearing In Part and Granting Rehearing In Part for Purposes of Further Consideration, issued April 14, 1976 in *Atlantic Richfield Company,* Docket No. CI76-226, ____ FPC ____.

were not made[9]. The Commission, citing its decision in the Southland Royalty Company, *et al.*, case found that the lessor would not be allowed to cease the sale of gas in interstate commerce without approval under Section 7(b).

In *Northern Natural Gas Company v. John L. Crawford,* Docket No. CS76-6, Order Determining Gas Dedication, ... FPC ....., issued September 29, 1976, Order on Rehearing, ... FPC ....., issued December 1, 1976, a lessee of six parcels of land released his interest in four of them after receiving a certificate from the Commission to sell gas for resale in interstate commerce from all six parcels. The Commission required an abandonment application here.

The foregoing cases as well as numerous other situations involving leases or other legal arrangements created by sellers of gas for resale in interstate commerce will be affected by the outcome of the instant case. If the decision of the Court of Appeals is upheld or permitted to stand the Commission authority under Section 7(b) will be significantly weakened.

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1. THE COMMISSION'S ORDERS DO NOT CONFLICT WITH APPLICABLE CONSTITUTIONAL PROVISIONS OR PROPERTY LAWS

The petitioners in the court below relied on common law property theories to support their case. They argued that a lessee cannot burden property beyond

[9]*Pennzoil Producing Company, Shell Oil Company,* Dockets Nos. RI76-8, RI76-10, Opinion 753, ... FPC ....., issued January 30, 1976, rehearing denied, Opinion No. 753-A, ... FPC ....., issued February 27, 1976, rehearing denied, Opinion No. 753-B, ... FPC ....., issued March 26, 1976.

the term of the lease. Hence, the Commission, by issuing Opinions Nos. 737 and 737-A subjecting the reversionary mineral interest owners to Section 7(b) abandonment proceedings, illegally burdened their property with Gulf's dedication of gas in interstate commerce. This, according to petitioners below, violated the Fifth Amendment to the United States Constitution by depriving them of property without due process of law as well as violating Texas property law.

The court below agreed with this line of argumentation. It stated:

> "It is black letter law that a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest (citations omitted). Since Gulf [the leaseholder] never was possessed of rights in the gas under the leasehold lands which could survive the termination of its 50-year lease, it never could create rights in a third person to that same gas."[10]

We respectfully disagree with the analysis of the court below. The Commission has not abrogated the property rights of the reversionary mineral interest owners. This group continues to hold full title to the subject mineral rights and to receive the economic benefits from the sale of gas. We submit that the Commission's orders do not conflict or overturn common law property principles or local property law. The orders implement the Natural Gas Act which places

[10]See Appendix B page 6.

certain regulatory requirements upon the gas in question by virtue of Gulf's leases and sale of gas in interstate commerce.

It is California's understanding that the decisions of this Court support the above analysis of the instant case.

In *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 4 L.Ed.2d 1623, 80 S.Ct. 1392 (1960), an independent producer was tendered a certificate of public convenience and necessity without time limitation for the sale of gas for resale in interstate commerce. The producer had requested that it be issued a certificate limited in time to the duration of a contract for the sale of gas which it had entered into. In analyzing the applicability of Section 7(b) abandonment authority, this Court discussed at length the aim of the Natural Gas Act to protect consumers against economic exploitation and the fact that private contracts could not be allowed to dictate the application of the Natural Gas Act.

This Court succinctly stated what the controlling factors were in a determination of the application of Section 7(b):

> "Our consideration of this, as well as the rest of petitioner's arguments, leads us to reiterate as our holding the clear implication of what we recently said in Catco [*Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378, 3 L.Ed.2d 1312, 79 S.Ct. 1246 (1959)]: An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.' . . ." (364 U.S. 156).

The Commission must look to the total natural gas reserve that was certificated and the flow of the natural gas in question, not the legal agreements concerning that gas.

In the *Catco* case cited above, the applicants for a certificate of public convenience and necessity had agreed upon a price for the sale of gas through a private contractual arrangement and attached a condition to their applications requiring the Commission to forego the consideration of this element of public convenience and necessity. This Court found that such a limitation was contrary to the scheme of the Natural Gas Act. The Commission could not be bound by private contractual arrangements. In describing the authority of and criteria to be used by the Commission under Section 7 of the Natural Gas Act, this Court set forth the language quoted above in this petition from the *Sunray* case indicating that the flow of gas in interstate commerce was the controlling factor in the application of the Natural Gas Act.

In *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 13 L.Ed.2d 357, 85 S.Ct. 486 (1965), another private contractual arrangement was at issue. In that case, the parties attempted to avoid Commission juris-

diction altogether by agreeing in their contract of sale that the gas was nonjurisdictional. This Court again held that the private contract was not controlling. Further, this Court again looked to the actual movement and use of the gas in issue as it did in *Sunray* as opposed to a contractual analysis to determine the applicability of the Natural Gas Act.

> "We said in Connecticut Co. v. Federal Power Commission, 324 U.S. 515, 529, 89 L.Ed. 1150, 1160, 65 S.Ct. 749, 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.' And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself has substituted a so-called legal standard for the technical one . . ." (379 U.S. 366 at 368).

While *Lo-Vaca* is somewhat different from the issue presented in the instant matter, it is referenced to point out the important fact that this Court has consistently resolved legal issues concerning the Natural Gas Act by looking at the actual dedication and flow of natural gas in interstate commerce.

In two more recent cases concerning abandonment proceedings, the question of the physical movement of gas was not directly in issue. However, this Court reaffirmed the rule that legal contract theories cannot govern the application of Section 7(b) of the Natural Gas Act.

In *United Gas Pipe Line Co. v. FPC*, 350 F.2d 689 (5th Cir. 1965), aff'd 385 U.S. 83, 17 L.Ed.2d 181, 87 S.Ct. 265 (1966), a pipeline company was ordered to

continue purchasing gas from a producer after a sales contract between the two had expired because no abandonment authorization had been granted, and in *Transcontinental Gas Pipe Line Corp. v. Federal Power Commission*, 488 F.2d 1325 (D.C. Cir. 1973), cert. denied 417 U.S. 921, 41 L.Ed.2d 226, 94 S.Ct. 2629 (1974) the Commission's abandonment order was overturned because it gave dispositive weight to private contracts and failed to consider the public necessity in an abandonment proceeding.

The petitioners in the court below argued that the instant fact situation is different from those cases cited above in that there was no sales contract between themselves and a purchaser that terminated. Rather, they argued, Gulf, the leaseholder, lost all rights to the subject mineral interests through termination of its leases. Since the reversionary mineral interest owners never dedicated their "separate" gas supply in interstate commerce the Commission could only find that the Natural Gas Act applied if the mineral owners somehow had dedicated gas in interstate commerce during the period of the Gulf leases. The mineral owners placed great weight on *Mobil Oil Corporation v. FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied 406 U.S. 976, 32 L.Ed.2d 676, 92 S.Ct. 2409 (1972). In that case the court held that royalty owners of gas being sold in interstate commerce were not themselves engaged in the sale for resale of gas in interstate commerce and hence need not obtain certificates for such sale under the Natural Gas Act. The reversionary mineral interest owners in the instant case were royalty owners during the term of Gulf's leases. The reli-

ance on the above-cited *Mobil* case apparently is based on the theory that the Commission mistakenly found that mineral owners dedicated their gas to interstate commerce through their royalty interests. The reversionary mineral interest owners then argued that under the *Mobil* case doctrine, their gas has never been dedicated in interstate commerce. The petitioners then proceeded to base their arguments on real property law on the assumption that the Commission has abused their property rights in the gas.

This interpretation, however, takes too narrow a view of the line of cases in this Court on the abandonment provision of the Natural Gas Act.

This Court has consistently stated that the purpose of the Natural Gas Act was to protect consumers from exploitation in the areas of rates and service.[11] In this regard the Court has given the widest interpretation to the applicability of the Natural Gas Act. The Court has refused to recognize various attempts to avoid the mandate of the Natural Gas Act including contract provisions and lease sale agreements.[12] While there might be a valid distinction between contracts and land leases for purposes of Texas property law, the distinction cannot be used to avoid the Natural Gas Act. The *Mobil* case relied on by the reversionary mineral interest owners is not relevant to the Com-

[11] *Sunray Mid-Continent Oil Co. v. FPC, supra,* 364 U.S. 137 at 147.

[12] *California v. Lo-Vaca Gathering Co., supra,* 379 U.S. 366; *United Gas Improvement Company v. Continental Oil Company, et al.,* 381 U.S. 392, 14 L.Ed.2d 466, 85 S.Ct. 1517 (1965).

mission's order. First, the *Mobil* case is only applicable to royalty interest owners. It does not apply to those owners after they convert that royalty interest into a form of control over the gas and attempt to remove the gas from interstate commerce. Secondly, the Commission did not find that the reversionary mineral interest owners dedicated gas in interstate commerce themselves. The Commission looked beyond the legal arrangements relied on by reversionary mineral interest owners and looked at the natural gas reserve that was initially dedicated to interstate commerce and the historic flow of the gas. Gulf had the right to dedicate all the residue gas in interstate commerce from the leased lands in question. In fact, a certificate was issued by the Commission authorizing the sale of all of that gas. The Commission's decision was based on the fact that this gas was now being withdrawn from interstate commerce. The Natural Gas Act imposes a regulatory requirement on the subject natural gas over and above local law. This Court stated in *United Gas Improvement Company v. Continental Oil Company, et al.,* 381 U.S. 392, 400: "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law".

The argument of the petitioners in the court below completely fails to recognize the primary logic for the Commission's decision in Opinion No. 737. The Commission looked to the natural gas reserve that was dedicated to interstate commerce. This Court, as cited previously, has stated that a supply of gas once dedicated in interstate commerce cannot be with-

drawn without Commission abandonment authorization. Clearly, the Commission cannot be bound by the underlying legal arrangement. The ownership rights in the subject gas, which remain undisturbed, cannot affect the service requirement which was undertaken by Gulf and which attached to the gas. The certificate issued to Gulf was unlimited and applied to the total volume of gas in the two fields in issue.

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2. THE PUBLIC INTEREST REQUIRES THAT ABANDONMENT AUTHORIZATION BE OBTAINED

It has been stated in several cases that the public interest is the ultimate criterion under Section 7(b)[13]. The only forum where a proper determination of the public interest can be made is an abandonment proceeding before the Commission. To allow the reversionary mineral interest owners to make the decision to abandon service without Commission approval would not only create a significant avoidance of the Natural Gas Act, it would place the consideration of the public interest in private hands.

An analogous situation was discussed in the *Sunray* case, *supra,* 364 U.S. 137 at 143, where the Court decried the contention of the applicants before the Commission that they should be given a certificate of public convenience and necessity limited to the time frame of a contract for the sale of gas. This Court

[13] *Atlantic Refining Co. v. Public Service Commission of the State of New York, supra,* 360 U.S. 378 at 388; *Transcontinental Gas Pipe Line Corp. v. Federal Power Commission, supra,* 488 F.2d 1325 at 1328.

pictured a "pandora's box" of activities that would place the application of the Natural Gas Act in the hands of producers and pipeline companies if such a certificate were granted. This Court pointed out that the Natural Gas Act was created to preclude just such economic control by pipeline companies and producers.

In the instant case, it is not unreasonable to foresee that the type of lease involved here could be used as a method of limiting the Commission's abandonment authority over significant amounts of gas. More importantly, this case directly affects the very basis for the Commission's authority to require abandonment under Section 7(b) of the Natural Gas Act. It effects a form of price decontrol by allowing gas producers to establish lease agreements that permit them to withdraw gas as prices change. It also severely hinders the Commission in its task of planning energy policy in the future and estimating available gas reserves because the decision essentially limits the Commission to control over gas under lease or contract rather than the entire gas reserve involved in a sale for resale in interstate commerce. The gas producers cannot be allowed to pick and choose when it is advantageous to them to leave the interstate gas market in total disregard of the public interest.

Opinions Nos. 737, 737-A and 737-B deal with gas production that has been flowing continuously in interstate commerce. The case law and the public interest requirements of the Natural Gas Act dictate that Section 7(b) abandonment proceedings be applied.

CONCLUSION

In view of the nationwide importance of an equitable and functioning regulatory scheme for the sale for resale and transportation of natural gas in interstate commerce and the requirement that a viable abandonment procedure be a part of that framework, California respectfully requests the opportunity to present this question to the Court more fully.

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: February 11, 1977.

Respectfully submitted,

JANICE E. KERR,

J. CALVIN SIMPSON,

RANDOLPH W. DEUTSCH,

Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Fifth Circuit

October Term, 1975

No. 75-3373

Your No. FPC CP75-209

Southland Royalty Company, et al.,
Petitioners,

versus

Federal Power Commission,
Respondent.

Petition for Review of an Order of the Federal Power Commission (Texas Case)

Before CLARK, RONEY and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Southland Royalty Company, et al. for review of an order of the Federal Power Commission and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this cause be, and the same is hereby reversed;

It is further ordered that respondent pay to petitioners the costs on appeal to be taxed by the Clerk of this Court.

December 13, 1976

Issued as Mandate:

Appendix B

United States Court of Appeals
for the Fifth Circuit

Nos. 75-3373, 75-2851, 75-3682,
75-3819 and 75-4001.

Southland Royalty Company, et al.,
Texaco Inc., Exxon Corporation, and
Mobil Oil Corporation,
Petitioners,

vs.

Federal Power Commission,
Respondent.

[Dec. 13, 1976]

Petitions for Review of Orders of the Federal
Power Commission (Texas Cases)

Before CLARK, RONEY and TJOFLAT, Circuit Judges.

CLARK, Circuit Judge:

Unprecedented escalations in the price of energy have stunned public, industry and engineers of federal regulatory process alike. The gross imbalance between controlled prices at which interstate natural gas must be sold[1] and the substantially higher values set by the free market for gas and other fuels has created a

[1]While this opinion was in preparation, the Federal Power Commission announced a dramatic increase in regulated natural gas prices which substantially eliminated this price gap.

sunburst of unique regulatory issues. Today's case is one such ray. Southland Royalty Co., and others,[2] (Southland) challenge opinions of the Federal Power Commission (FPC) which held that natural gas which Southland now owns in fee under a leasehold reversionary interest had been dedicated to interstate commerce by the lessee of the property. The challenge presents this significant property rights vs. regulatory powers issue: Does the lessee under a 50-year fixed-term mineral lease, by making certificated sales of leasehold natural gas in interstate commerce, thereby dedicate to interstate commerce the gas which remains in the ground at the end of the 50th year? The FPC answered affirmatively. We reverse.

Two different leases are involved in the present case. Gulf Oil Corp. (Gulf) entered into a 50-year fixed-term lease on July 14, 1925, with W. N. Waddell. This lease covered approximately 46,000 acres in Crane County, Texas. Southland is the successor in title to the Waddell reversionary interest. After *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), Gulf received a certificate of public convenience and necessity from the FPC which authorized the sale of surplus residue gas under its lease in interstate commerce to El Paso Natural Gas Co. (El Paso).[3] A separate certificate

[2]Southland Royalty Company has ownership of approximately 47% of the acreage involved; trustees under the will of Warren Wright have 25.7%; Exxon Corporation, 14%; and more than 100 others own lesser shares.

[3]"Surplus residue gas," or casinghead gas, was the sole product sold by Gulf to El Paso. Gas-well gas from these properties was not dedicated to interstate commerce and has instead remained in the intrastate market.

was issued after Gulf and El Paso entered into a second contract in 1972 for the sale of further volumes of surplus residue gas. At no time was Southland a party to these contracts or the certification; the only interest which Southland held was the right to receive a royalty on the gas sold. Shortly prior to the end of Gulf's 50-year term, Southland contracted with the operator of an intrastate natural gas pipeline, Intratex Gas Company, for the future disposal of the gas covered by Southland's reversionary interest.

A similar 50-year fixed-term lease was executed August 7, 1925, between Gulf as lessee and Goldsmith and others as lessors. This lease covered approximately 20,000 acres in Ector County, Texas. In 1929 Texaco, Inc., acquired a one-fourth interest in the Goldsmith reversion. Southland also has a fractional interest in the reversion in the Ector County properties, as do other parties. The lessee, Gulf, made the same sort of unqualified interstate dedication of the natural gas being produced from this lease.

El Paso petitioned the FPC for a declaratory order establishing that Southland could not sell its gas in the intrastate market without first seeking FPC approval through abandonment procedures. 15 U.S.C. § 717f(b). Texaco also sought clarification of its position with regard to the Ector County properties, and its petition was consolidated with that filed by El Paso.

The FPC held that the reversioners could not remove the gas from the interstate market without FPC approval to abandon. The principal basis for its

conclusion was the unqualified dedication by the initial lessees of the properties committed all of the lease-hold gas including that which might become the property of reversioners to the interstate market. Alternatively, the FPC asserted that the acceptance of royalties from interstate gas sales of the lessees constituted ratification by the reversioners.

The FPC reasoned that this provision of Section 7(b) of the Natural Gas Act:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any *service rendered* by means of such facilities, without the *permission and approval of the Commission* first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment. [15 U.S.C. § 717f(b) (Emphasis supplied by the Commission.)]

and this language from the Supreme Court's opinion in *Atlantic Refining Co. v. Public Service Commission* [*CATCO*], 360 U.S. 378, 388-89, 79 S.Ct. 1246, 1253-54, 3 L.Ed.2d 1312 (1959):

> The [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. . . . Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.

authorized the conclusion that once the lessee had made a dedication of gas from the leasehold, none of the gas under those lands could be removed from the interstate market unless the FPC authorized abandonment. That Gulf's ownership was always limited to the gas produced within a fixed 50-year term was held to be irrelevant.

Under applicable Texas law, Gulf's rights were those of a tenant for a term of years; its interest was a limited one which terminated completely when title reverted to Southland at the expiration of the 50-year term. It is black letter law that a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest. 2 R. Powell, The Law of Real Property ¶247[1] (Rohan Ed. 1967). *See also, e. g.*, 1 H. Tiffany, The Law of Real Property § 153 (3d ed. 1939); 2 H. Williams & C. Meyers, Oil & Gas Law § 332 (1975). Since Gulf never was possessed of rights in the gas under the leasehold lands which could survive the termination of its 50-year lease, it never could create rights in a third person to that same gas. *Waddell v. Empire Drilling Co.*, 358 S.W.2d 221 (Tex.Civ.App.—Eastland 1962, writ ref'd n. r. e.). The estates in the single tract are as separate as though they subsisted in separate parcels of land. Though it is unquestioned that Gulf's dedication covered all of the surplus residue gas it produced during its lease term, there likewise can be no question that, under well established concepts of property law, Gulf could not legally deal in or dedicate that portion of the gas which South-

land might own upon termination of Gulf's estate. Indeed, the FPC does not attack this construction of Texas law. Rather, it emphasizes that (1) the extent of Gulf's rights during its 50-year term was unquantified; (2) under its presently vested leasehold estate, Gulf had the right to withdraw all of the natural gas under the lease land if it could; and (3) the interest of the reversioners was both future and contingent. Under this state of affairs, FPC asserts that Gulf was empowered to dedicate all lease gas to the interstate market.

Though the FPC attempts to distinguish it, the conclusion reached in the case of *El Paso Natural Gas Co. v. Perry R. Bass*, 48 F.P.C. 1269 (1972), is a compelling argument for our decision here. Bass contracted with Shell Oil Company to develop the gas under his property, retaining, however, a royalty interest and an option to convert his royalty interest into a one-half working interest. Under the contract, Shell had no right to sell any gas attributable to Bass's working interest. Shell's operations were certificated by the FPC for sales in interstate commerce to El Paso Natural Gas Company. Bass elected to convert his royalty to a working interest; El Paso sought a declaratory opinion from the FPC that Bass must proceed under the abandonment section of the Natural Gas Act as to his one-half working interest.[4] Responding to this contention, the FPC wrote:

> The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to sell. We will not

[4] 15 U.S.C. 717f(b).

> alter so the basic property rights of mineral interest owners through the fiction of Section 7(b) application . . . . El Paso's rights to purchase gas from . . . [the well] can rise no higher than Shell's rights to sell that gas. . . .

The alleged distinction between the *Bass* situation and the present case, namely, that Bass retained a present interest while here Southland had a future interest, is a distinction without a difference. In neither instance can a lessee encumber that which it does not own. To the extent that Gulf's present interest in all of the natural gas is contingent upon its removal within 50 years, the right to dedicate that gas removed to interstate commerce is likewise contingent. Whatever gas is left under the lease lands at the end of 50 years is not Gulf's gas and, by the plain terms of the limited leasehold estate, never belonged to it from day one forward.

The FPC's position could be apropos to a situation in which the subsequent holder of rights in the minerals has acquired or "succeeded" to those rights from a former holder who encumbered the estate. In general, when a successor comes into possession of the estate, he acquires it with all of the burdens on the property which were validly created by his predecessor in interest.[5] The contrary is true where the initial owner of property creates a limited estate in another subject to a provision that the remainder of the rights

[5] *Hartel v. Dishman*, 135 Tex. 600, 145 S.W.2d 865 (1940); *Stevenson v. Clausel*, 437 S.W.2d 404 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ).

in the land will revert to the original owner upon the expiration of time. Such a conveyance creates no right to encumber or restrict the reversionary estate.[6] The FPC's failure to appreciate these basic distinctions in property law[7] is the genesis of its error.

The FPC also relied on *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960), in which the Supreme Court ruled that the request of Sunray for a limited 20-year certificate for sale in interstate commerce (based on Sunray's 20-year contract with the interstate pipeline company involved) did not restrict the FPC to issuance of such a limited certificate. The Court reasoned that when Sunray chose not to "avail itself of its undoubted right to stand firm on its own application, and reject the proffered certificate," it waived its right to deny the certificate's validity. Id. at 141, 80 S.Ct. at 1395. The Court pointed out that the certificate of public convenience and necessity contemplated by the act is not intended to relate to any specific sale contemplated by the parties. Instead, it is based on the service to be rendered—the movement of natural gas in interstate commerce. Thus, the contract between the pipeline company and Sunray was merely the arrangement under which Sunray commenced its service.

[6] *First Nat. Bank v. Amarillo Nat. Bank*, 531 S.W.2d 905 (Tex.Civ.App.—Amarillo 1975); *Moore v. Kirgan*, 250 S.W.2d 759 (Tex.Civ.App.—El Paso 1952, no writ).

[7] The Commission stated "[f]or the practical purposes of the Act it makes no difference whether the successors happen to be assignees, purchasers or reversionary interests." Opinion 737, July 11, 1975.

The FPC's reliance upon *Sunray* as authority here is misplaced. The Court did not require Sunray to dedicate to interstate markets oil or gas which it did not own. It enforced the statutory scheme without impairing any contractual right since at the end of its initial 20-year sale contract period Sunray (or its successors in title) would still be the legal owner of the leasehold mineral estate. Indeed, the Court clearly indicated that it contemplated the continuation of ownership of the commodity which was dedicated by its reference to Sunray's ability to effectuate delivery of the service as a prerequisite to certification. On the other hand, Gulf, in the present case, at all times lacked the legal ability to deliver any gas from Southland's property after the expiration of its limited 50-year term.

The FPC further contends that since the application by Gulf for a certificate to sell in interstate commerce did not mention its limited interest, Southland cannot contend that its reversion is not subject to FPC control. Under such a theory a present interest holder could bind his reversioner by taking actions that exceed the actor's rights. The FPC's position is that this invasion should be permitted and the reversioner "protected" by a cause of action in state court against the present interest holder for the wrong. The approach stands both logic and land law on their heads. It is fallacious to justify the creation of a wrong by demonstration that a remedy is possible. Under Texas law Gulf's 50-year lease interest did not authorize it to impose any limitation on the reversionary estate. Having no right, it equally lacked the power to encumber the reversion by actions in excess of those authorized by its grant.

We are not concerned in the present case with any possibility of apparent or implied authority. Gulf's lease was properly recorded on the public land records. Its 50-year term limitation was within the FPC's constructive, if not its actual, knowledge. The contention that a lack of information justified reliance by the FPC and the public that the dedication to interstate markets of this gas extended beyond the expiration of Gulf's lease term is an assertion supported by neither fact nor authority. Moreover, no mention of this contention before us was made in the FPC's opinion. *See FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974). We reject this argument on both substantive and procedural grounds.

Alternatively, the FPC argues that Southland ratified Gulf's improper dedication of all leasehold gas to interstate commerce by acceptance of royalty payments during the term of the leases. Ratification implies knowing choice.[8] By accepting royalties paid by Gulf during the term of its lease, the holders of the reversionary interest committed no action inconsistent with their reversionary rights. The sale of natural gas produced from the leaseholds within the lease term was solely Gulf's prerogative. The holders

[8] *Williams v. Thrasher*, 62 F.2d 944 (5th Cir. 1933); *Kunkel v. Kunkel*, 515 S.W.2d 941 (Tex.Civ.App.—Amarillo 1974, writ ref'd n. r. e.); *Yelderman v. McCarthy*, 474 S.W.2d 781 (Tex.Civ.App.—Houston [1st Dist.] 1971, writ ref'd n. r. e.).

of the reversion could not control its exercise further than to require payment of the proper contract royalty. By accepting that royalty, the petitioners received only that to which they were entitled under their lease. As we have held above, under Texas property law Gulf could not bind the reversionary estate by its actions. Thus, lessors could not have known it would be claimed that Gulf's dediction of its gas affected their reversionary interest.

The decision of the Federal Power Commissions is

REVERSED.

Appendix C

United States of America
Federal Power Commission

Opinion No. 737

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

DECLARATORY OPINION AND ORDER ON TERMINATION OF LONG-TERM LEASES

Issued: July 11, 1975

DC-50 & 51

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer,
and Don S. Smith.

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

Opinion No. 737

DECLARATORY OPINION AND ORDER ON TERMINATION OF LONG-TERM LEASES

(Issued July 11, 1975)

PER CURIAM.

El Paso Natural Gas Company on January 20, 1975, filed in Docket No. CP75-209 a petition for a declaratory order with respect to a 50-year fixed term lease currently held by Gulf Oil Corporation and others (Gulf, *et al.*) which will expire on July 14, 1975. By the terms of the lease Gulf obtained the exclusive right to produce and sell oil and gas from 45,771 acres of land in Crane County, Texas. When the lease expires, the mineral rights will revert to the mineral interest owners (Southland, *et al.*)[1]

[1]Originally the lease was executed with W. N. Waddell, *et al.* as lessors. Present owners include Southland Royalty Company 47.00%, Trustees under the will of Warren Wright 25.7%, Exxon Corporation 14%, and more than 100 others.

Gulf, *et al.* make percentage type sales to Warren Petroleum Company, now a division of Gulf covering certain quantities of casinghead gas produced from the Crane County acreage. Pursuant to two gas purchase contracts, dated January 26, 1951, and March 1, 1972, Warren sells to El Paso approximately 60,000 Mcf per day of surplus residue gas at the outlet of the Waddell Gasoline Plant, and El Paso transports this gas through its jurisdictional facilities for subsequent resale in interstate commerce. Approximately 25,000 Mcf per day of this residue gas comes from wells leased by Gulf, *et al.*

Upon termination of the lease the owners of the mineral interests will hold a fee simple title as reversioners to their pro rata share of the mineral estate underlying the subject acreage. *Gulf Oil Corp. v. Southland Royalty Co.*, 496 SW2d 547, 522 Tex. Sup. Ct. 1973 (1973). The mineral interest owners state that they have agreed to sell to Intratex Gas Company the gas from their fee simple estate. Furthermore El Paso says that Exxon has solicited proposals for the purchase of the gas attributable to its reversionary interest rights for sale in intrastate commerce.

On this state of facts on which there is no dispute El Paso seeks an order determining whether Southland, *et al.* may sell the gas from the Crane County leasehold in intrastate commerce without prior permission and approval of the Commission under Section 7(b) of the Natural Gas Act, whether Gulf, *et al.* must obtain the permission and approval of the

Commission to cease making sales to Warren and to transfer their rights to Southland, *et al.*, and whether Warren (now Gulf) may reduce its sales to El Paso to the extent they are attributable to the leasehold property without prior Commission permission and approval.

In like manner on April 8, 1975, Texaco Inc. in Docket No. CI75-594 filed a petition for a declaratory order to determine whether a lessee, by making an interstate gas sale, can commit more than its real property interest (i.e. its rights under its lease) thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act. The facts underlying Texaco's petition are similar to those involved in El Paso's petition. In 1925 Gulf, as lessee, and Goldsmith, *et al.* as lessors, executed a 50-year fixed term oil and gas lease by which Gulf obtained exclusive mineral rights to some 19,840 acres in Ector County, Texas, until August 7, 1975, when the mineral rights would revert to Goldsmith, *et al.*, with whom Texaco acquired a ¼ interest in 1929. Gulf sells gas from the Ector County leasehold to Phillips Petroleum Company under a percentage-type casinghead gas sales contract, and Phillips sells the residue gas from the tailgate of its Goldsmith Plant to El Paso. Approximately 18,000 Mcf per day of the residue gas sold to El Paso by Phillips is attributable to the Ector County lease. Texaco says that it is has knowledge of these sales contracts but is not a party to either one.

On June 3, 1975, after a petition by Texaco, the Commission consolidated Docket Nos. CP75-209 and CI75-594 because of the similarity of the facts and legal questions, found that because there was no factual dispute and no request for a hearing there was no need to hold an evidentiary hearing, and provided opportunity for filing briefs. Accordingly, initial briefs were filed on June 20, 1975, or thereabouts, by Mineral Interest Owners, El Paso, Texaco, Gulf, People of the State of California and the Public Utilities Commission of the State of California, Exxon, Mitchell Energy Corporation and the Staff. Reply briefs were filed on June 25, 1975, by Mineral Interest Owners, El Paso, Texaco, Exxon, Phillips and the Staff.

On July 2, 1975, Exxon filed a motion requesting the Commission to include protective relief in any final order in the form of payback of volumes of gas if the Commission's order is reversed on review. The Mineral Interest Owners responded on July 3, 1975, supporting Exxon's motion on the basis of their understanding of it. By telegram of July 7, 1975, Gulf also supported the motion, and El Paso concurred on July 10, 1975, with a request for an amendment of the protective language.

On the question whether Southland, *et al.* may sell the gas from the Crane County leasehold in intrastate commerce without Commission approval and whether Goldsmith and Texaco may do likewise with respect to the Ector County gas, Mineral Interest Owners, Exxon and Texaco, with the support of Gulf, argue

variously that they are not required to obtain abandonment authority before initiating intrastate sales. They point out that the Commission has no authority to compel a producer to sell his gas in interstate commerce, and that their royalty interest does not make them sellers of gas in interstate commerce within the meaning of the Natural Gas Act and in no way dedicates their gas to the interstate market. They cite *Mobil Oil Corp v. F.P.C.*, 463 F.2d 256 (CADC 1971), *certiorari denied*, 406 U.S. 976 (1972), where the Court held that royalty owners were ordinarily not sellers of the gas. They note that in the instant case Gulf possessed only a 50-year leasehold right and had no legal authority to sell the gas produced beyond the termination date of the lease.

They rely heavily on *El Paso Natural Gas Co. v. Perry R. Bass*, 48 FPC 1269, Opinion No. 638 (1972). There Shell held a farm-out lease from Bass, who retained a royalty with the option after Shell recovered the cost of drilling to receive in lieu of the royalty a ½ working interest in the lease. Shell later sold gas from its "properties" to El Paso, and El Paso was to purchase from seller's "interest" in the wells. Still later Bass notified Shell of its election to accept a working interest and attempted to sell its working interest gas to Natural Gas Pipeline Company, but El Paso objected. The Commission held that the Shell-El Paso contract did not purport to cover any gas save that produced from the properties owned by Shell, that Bass was a royalty owner and not a seller, that Section 7(b) did not apply to Bass, that farm-

outs should be encouraged and that Bass did not have to obtain abandonment authorization before making its sale to Natural.

Texaco also argues that there will be no transfer of rights for the Commission to consider when Gulf's leases expire, for the leasehold estates will vanish and the reversion will occur by operation of law. Texaco also contends that the Commission lacks authority to adjudicate matters of title and must conform to state law, citing *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Both Texaco and Exxon also argue that they would be deprived of their properties without due process of law in violation of the Fifth Amendment if they were forced to sell their gas to El Paso after Gulf's leases terminate.

El Paso takes a contrary view. It says that once natural gas begins to flow in interstate commerce it becomes dedicated and Section 7(b) provides the exclusive means of terminating the service. The lessees have dedicated the gas produced by their wells and regardless of the termination of the lease, service must continue. It contends, further, that the reversionary interest owners step into the shoes of their predecessors, Gulf, *et al.*, and take the properties subject to the interstate dedications. It emphasizes that abandonment should not be permitted without a proceeding to determine that there is no betrayal of justifiable public reliance on the gas involved.

California says that the emphasis should not be placed on the contractual arrangements but on the

fact that the gas is currently dedicated to interstate commerce by physical movement in El Paso's pipeline. California also argues that the *Mobil* case should not apply and that in any case the reversionary owners are like the sellers of leases in the *Rayne Field* case, *U.G.I. v. Continental Oil Co.,* 381 U.S. 392 (1965).

It is the position of the Staff that the gas from the subject acreage, whether produced before or after expiration of the leases, is dedicated to the interstate market and that by virtue of their control over the gas the reversioners are subject to the constraints of Section 7(b). Staff adds that once the reserves are dedicated to the interstate market they become a part of the Commission's regulatory scheme, safeguarded by Section 7(b) to insure continuity and stability of service.

In our opinion the various mineral interest reversioners may not sell gas from the two leaseholds in intrastate commerce without prior permission and approval of the Commission. Although we have discovered no case directly in point, we are of the opinion that the cases and the purpose of the Natural Gas Act inevitably lead to this view. In the first place, the dedication involved is not the dedication of an individual party or producer, but the dedication of gas. In *CATCO, Atlantic Refining Co. v. P.S.C. of New York,* 360 U.S. 378 (1959), the Court said that once gas is dedicated "there can be no withdrawal of that supply from continued interstate movement without Commission approval." Furthermore, contractual

arrangements are not controlling as to whether the gas may be withdrawn from dedication. In *Sunray Mid-Continent Oil Co. v. F.P.C.,* 364 U.S. 170 (1960) the Court upheld the Commission in granting an unlimited term certificate. The Court noted that the "service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service". Here a service is being rendered by Gulf to El Paso utilizing the gas in the Crane County and Ector County leases.

Because of the termination of the 50-year leases the lease holders, Gulf *et al.,* lose their leases and their rights pass to Southland, *et al.* in one case and to Goldsmith, *et al.* and Texaco in the other case. Of course, we have determined that gas may not be withdrawn from interstate commerce by the assignment of leases from one lessee to another. *Cumberland Natural Gas Company,* 34 FPC 132 (1965); *Blair-Vreeland,* ..... FPC ....., Opinion No. 724, Docket No. CI74-331, March 18, 1975. But we do not rest our conclusion on these cases, but on the principle established by Section 7(b) that "service" may not be abandoned without our permission and approval. Thus, it makes no difference whether a lease is transferred or terminates, the obligation of service imposed upon the dedicated gas continues. As said in *Hunt v. F.P.C.,* 306 F.2d 334, 342 (CA 5, 1962), rev'd on other grounds, 376 U.S. 515 (1964), the duty to continue to serve is like an ancient covenant running with the land. This does not mean that we are modi-

fying the law of Texas as to the leasehold rights; we are however recognizing rights and duties that have been created by the Congress under the Natural Gas Act. Nor are we depriving the reversioners of their property without due process of law, for we are merely holding that their property is subject to a Section 7(b) proceeding and, in any case, they will be compensated for any continued interstate sales under the Natural Gas Act.

The *Mobile* case does not call for any different result. Under that case the mineral interest owners in each of the leaseholds are not natural gas companies. However, the gas has been dedicated to interstate commerce and was being sold in interstate commerce by Gulf, *et al.* It cannot be sold in intrastate commerce, and the sales in interstate commerce abandoned without our permission and approval under Section 7(b).

The *Bass* case, which did not involve the diversion of gas from interstate commerce, likewise does not alter our result. There the lessee, Shell, by means of its contract with El Paso, plainly intended to provide a service based upon the dedication of its interest in the leasehold, not the interest of Bass, who had the right to receive a ½ working interest in lieu of his royalty. The interstate dedication thus covered only part of the leasehold, while here the leaseholds were wholly dedicated to interstate commerce. In any case, we believe that the broad language used in *Bass* should be confined to the facts of the case and not extended to the difficult situation here involved. We therefore

conclude that Section 7(b) applies to the sale of the gas from the dedicated reserves in the two leaseholds involved here until they are exhausted.

Mitchell Energy argues that should the mineral interest owners be held to be subject to Section 7(b) it would be erroneous for the Commission to exercise any jurisdiction over any reserves not connected to facilities rendering jurisdictional service. Thus undiscovered and undeveloped reserves, it says, fall beyond the Commission's jurisdiction over abandonment. Mitchell Energy is arguing over again the issues which it raised in Opinion No. 733, *Mitchell Energy Corporation,* ..... FPC .....), Docket No. CI75-296, issued June 11, 1975. We believe those issues are adequately covered in that opinion.

As to whether Gulf, *et al.* must obtain abandonment permission in order to cease sales to Warren and transfer their rights to Southland, *et al.,* El Paso argues that the lessees have dedicated the natural gas produced by their wells to interstate commerce and may not cease making sales of the gas from these wells without abandonment authorization. El Paso indicates, however, that because Gulf has merged with Warren, Gulf would not have to obtain abandonment of its sale to Warren, but would to Phillips. Gulf itself points out that by virtue of the merger of Warren into Gulf there are no sales of gas between Gulf and Warren. Exxon says that with the expiration of the 50-year lease, El Paso's right to purchase production from Gulf ceases and so it does not require abandonment authorization.

Staff says that an abandonment application by lessees would be superfluous and inconsistent with the purpose of Section 2.64 of the Commission's General Policy and Interpretations to avoid unnecessary filings. However, as El Paso argues, Section 154.91(e) of the Commission's Regulations leaves subject to Section 7(b) producers making percentage-type sales to plant operators selling gas in interstate commerce. Therefore it would seem that Gulf would have to file for abandonment of its sales to Phillips, and the other lessees would have to file for abandonment of their sales to Phillips and Gulf's former affiliate Warren, now part of Gulf. In our opinion this is not a mere technical requirement as Staff would have it but would allow as to pass upon the merits of the lessees' abandonments upon the termination of the 50-year leases as well as the proposed abandonment of the reversioners, who want to remove the gas from interstate commerce. We should have all the significant parties before us if the relations between the reversioners, lessees, processing plants, and El Paso are to be changed.

As to whether Warren and Phillips may reduce their sales to El Paso without prior Commission permission and approval El Paso points out that the sales are in interstate commerce and abandonment authorization must be obtained if the quantities are to be permanently reduced even though the contracts provide for the sale of only surplus residual gas. Gulf points out that Warren now means Gulf and says that upon expiration of the fixed term leases the gas produced therefrom will no longer contribute to

the surplus residue gas Gulf could sell to El Paso, that the gas will belong to the reversioners, and that Gulf will have no control over it. The Staff, Exxon and Phillips say that under Section 154.91(e) of the Regulations the only obligation on a plant operator is to file an annual report listing any changes in the producers from whom the gas is purchased.

In our opinion the Commission did not intend to exempt plant operators from the requirement that they apply under Section 7(b) for abandonment of their sale to the extent that the sale has been reduced by a substantial and permanent loss of supply. Therefore the two plant operators Gulf (Warren) and Phillips should make applications under Section 7(b) if they lose substantial amounts of the gas they sell to El Paso upon termination of the 50-year leases.

In its motion of July 2, 1975, Exxon argues that whether the Commission acts before July 14, 1975, or thereafter, the Commission's action may impose obligations upon a party which will result in irreparable injury to that party if the Commission order should be reversed upon court review. It points out that it would not be desirable to shut in production pending action upon a request for stay since such action would result in interruption of oil and gas production and possible permanent damage to the wells. It requests that the Commission in its final order in this proceeding include language intended to protect all parties pending ultimate judicial review.

Briefly Exxon would require that if the Commission requires abandonment authorization for the min-

eral interest owners, as we have here, and it should be determined on review that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon or other mineral interest owners shall not constitute a dedication of their gas to the interstate market, acceptance of monies shall not prejudice the rights of the mineral interest owners to claims for any rate different from the rate tendered by El Paso, and El Paso shall be required to repay Southland, Exxon and the other mineral interest owners in gas for the deliveries made to it during judicial review. Mineral Interest Owners state their support of Exxon's motion with certain reservations. El Paso concurs with Exxon's conclusion as to the need for protective language in the Commission's order. However, since payback of gas either to or by El Paso will affect directly El Paso's level of service to the interstate market, El Paso believes that Exxon's language should be amended by requiring payment subject to further Commission order.

In our opinion it is not appropriate for us under the Natural Gas Act to include the protective provisions requested by Exxon. We believe that if the parties need protective provisions in the form of a stay, payback of gas volumes or otherwise, they should address themselves to the appropriate court.

The Commission orders:

(A) In accordance with the above discussion:

(1) Southland, *et al.*, Exxon, Goldsmith, *et al.*, Texaco and other mineral interest owners of gas

reserves in the Crane County and Ector County leases involved here may not. upon termination of the leases, sell gas in intrastate commerce without prior permission and approval of the Commission under Section 7(b) of the Natural Gas Act;

(2) Gulf, itself, need not obtain abandonment. permission and approval to cease sales to its division, Warren, but other lessees must do so, and Gulf must do so with respect to its sales to Phillips;

(3) Gulf, formerly Warren, and Phillips may not reduce their sales to El Paso to the extent such sales are attributable to production from the subject leasehold property without prior Commission permission and approval.

(B) Exxon's motion to include protective language in the Commission's order is denied.

By the Commission.

(S E A L)

Mary B. Kidd,
Acting Secretary

Appendix D

United States of America
Federal Power Commission

Opinion No. 737-A

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

OPINION AND ORDER DENYING
REHEARING BUT ADOPTING PER CURIAM

Issued: September 3, 1975

DC-51

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer and
Don S. Smith.

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

Opinion No. 737-A

OPINION AND ORDER DENYING
REHEARING BUT ADOPTING PER CURIAM

(Issued September 3, 1975)

Texaco Inc. on August 4, 1975, a group of Mineral Interest owners and Exxon Corporation on August 8, 1975, Gulf Oil Corporation (Gulf) and El Paso Natural Gas Company, on August 11, 1975, and Mobile Oil Corporation on August 13, 1975, have filed applications for rehearing of the Commission's Opinion No. 737 and order issued July 18, 1975, in the above-entitled proceedings. In Opinion No. 737 the Commission determined that the various mineral interest owners holding reversionary interests in 50-year leases covering certain gas reserves in Crane County and Ector County, Texas were subject to the dedications made by the leaseholders, Gulf and others,[1] for

[1] As here used Gulf includes the other leaseholders and predecessors.

the sale of the gas in interstate commerce to El Paso Natural Gas Company and that, upon termination of the leases, they might not sell gas in intrastate commerce without obtaining abandonment approval under Section 7(b) of the Natural Gas Act. The Commission also determined that Gulf need not obtain permission to cease sales to Warren Petroleum Company, now a division of Gulf, but that other leasees must do so, and that Gulf must do so with respect to its sales to Phillips Petroleum Company for resale to El Paso. Further, Gulf, formerly Warren, and Phillips may not reduce their sales to El Paso to the extent such sales are attributable to production from the subject property without prior Commission permission.

The applications for rehearing largely involve restatements and amplification of the arguments already made and covered in Opinion No. 737. The mineral interest owners contend that the only service dedicated to interstate commerce was the service of delivering all of the gas attributable to the fixed-term leaseholds estates. Just as half of the gas from a well may be dedicated to interstate commerce and half to intrastate commerce here, they say, only the leasehold interests were dedicated to interstate commerce. In our opinion there is a difference. Predecessors of Gulf commenced the service of delivering gas from the reserves here involved to interstate commerce. Gulf could have at the same time commenced delivering part of the gas here involved to intrastate buyers, and we would recognize such an intrastate dedication. Here, however, we are solely concerned with the service commenced by Gulf to El Paso in interstate commerce. Under Section 7(b) of the Natural Gas Act this service may not be abandoned without the permission of the Commission. Nor, as we said in Opinion No. 737, can this service be discontinued by transfer to a successor interest. For the practical purposes of the Act it makes no difference whether the successors happen to be assignees, purchasers or reversionary interests. While the contractual right to control and sell the reserves here involved has passed from Gulf to the various mineral interests, this does not mean that under the Natural Gas Act the gas flowing in interstate commerce may be diverted to the intrastate market. As said in *Huber Corp.* v. *F.P.C.*, 236 F.2d 550, 558 (CA3 1956), Congressional power to regulate interstate commerce in natural gas includes authority to regulate abandonment of sales.

Several of the applicants for rehearing argue, as they have previously, that *El Paso* v. *Bass*, 48 FPC 1269, Opinion No. 638 (1972) is contrary to our position here. There Bass entered into a farmout agreement with Shell to develop a producing area retaining a 1/8 overriding royalty with an option to convert it to a 1/2 working interest. Shell later entered into an agreement to sell gas to El Paso from "seller's interest in wells". Still later Bass exercised his option to convert to a working interest and proposed to sell his share of the gas to another pipeline. The Commission held that Bass might do so without obtaining abandonment authorization.

The chief differences between the *Bass* situation and the present one is that the Shell sale agreement

pointedly made it clear that Shell was only selling gas from its interest in the properties involved while in the present case Gulf had a long leasehold interest and sold surplus residue gas available from its leasehold properties. To the extent, however, that *Bass* can be said to stand for the proposition that the service initiated by the leaseholder based upon certain gas reserves covered by the lease can be terminated without Commission approved, it is overruled. It should be noted that Bass did not involve the shift of gas reserves from interstate to intrastate commerce and did involve the public interest in the encouragement of farmouts, and these circumstances, in part, explain the result in *Bass*.

The Mineral Interest Owners, Exxon and Texaco argue variously that we have violated the property law of Texas, the Tenth Amendment to the United States Constitution reserving to the states powers not granted to the Federal Government, and the Fifth Amendment by depriving them of property without due process of law. The essence of the argument appears to be that we are in error in holding that the leaseholders, Gulf *et al.*, had power to encumber the property with the result that the mineral lease owners are forced to enter into an interstate sale against their will. We assume that in 1925, when the leases were made the lease owners did not contemplate that the Natural Gas Act would be enacted with a provision that service might not be abandoned without approval of the Commission. They clearly did contemplate that the leaseholders would drill for oil and gas and sell oil and gas to outside parties, and there was no rea-

son that these sales could not be in interstate commerce, and may have had a duty to do so under the facts and law at that time. After the Natural Gas Act was enacted in 1938 and the *Phillips* case[2] was decided in 1954 the interstate sales of gas became subject to FPC jurisdiction. The leaseholders who had a duty to exploit the wells were the appropriate parties to seek FPC certification. Upon the commencement of interstate sales under FPC certification, the sales became imbued with the public interest.[3] The law of Texas preserved for the lease owners their property interest, and we do not change this, but Section 7(b) of the Act will not permit abandonment of interstate sales without our authority once such sales have commenced. The mineral lease owners who entered into a lease that permitted the leaseholders to make interstate sales are not deprived of this property by being required to permit such sales to continue, and they will be compensated under the just and reasonable rates promulgated under the Natural Gas Act.

These considerations, in our opinion, answer the argument of Exxon that it is being forced to make a sale at the termination of Gulf's leasehold interest and that this constitutes an unlawful taking under the

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[2] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

[3] The lease owners could have intervened in the proceedings granting certificates to Gulf and Phillips Petroleum Co. to sell the gas to El Paso but our records do not reveal that they have done so. See orders dated May 28, 1956, in Docket No. G-7156, September 28, 1956, in Docket No. G-2625, 16 FPC 1440, and February 24, 1958, in Docket No. G13445, 19 FPC 1151, among others. However, the lease owners apparently had no objection to this interstate dedication, for they accepted royalties from such sales.

Fifth Amendment. The sale of gas was already being made from the properties here involved before the advent of regulation. Exxon or its predecessors had leased the properties for this purpose. The imposition of regulation did not constitute an unlawful taking. *Nebbia* v. *New York*, 291 U.S. 502 (1939); *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942). A producer contracting to sell gas in interstate commerce before regulation commences is properly subject to Section 7(b) although he may never have contemplated such a result. See *Harper Oil Co.* v. *F.P.C.*, 284 F.2d 137 (CA10 1960). Here Exxon is not being forced to make an initial sale but is required to conform to the Natural Gas Act when it succeeds to the interest of Gulf.

The Mineral Interest Owners, Exxon and El Paso argue that the Commission should provide protective relief, *pendente lite*. In Opinion No. 737 we discussed a proposal by Exxon that if we required abandonment authorization for the mineral interest owners, as we had, and if it were determined on judicial review that the gas might be sold to others than El Paso without abandonment authority, then any deliveries by the mineral interest owners should not constitute a dedication of their gas to the interstate market, acceptance of monies should not prejudice their right to a different rate, and El Paso should be required to repay them in gas for deliveries made to it during judicial review. However, we determined that it was not for us to include the protective provisions and that the parties should address themselves to the appropriate court.

Since Opinion No. 737, the Mineral Interest Owners on July 14, 1975, obtained a temporary stay of the Commission's order in the United States Court of Appeals for the Fifth Circuit. As of the same date upon the consent of Southland Royalty Company et al., Exxon, El Paso and the Commission, the Court issued an Interim Protective Order containing language corresponding to Exxon's proposal set forth here in ordering clause (B). The Court's order provided that it should be effective until a petition for review of the final Commission order on rehearing of Opinion No. 737 is filed in a court of appeals and any concurrently filed motion for stay or protective order is decided by the court of appeals and further judicial review is exhausted. The Court's order noted that the FPC represented that it did not concede that the Court had jurisdiction to enter a protective order in this matter, but in order to settle a controversy inasmuch as the Court had determined to act, the F.P.C. had represented that it believed that the foregoing provisions were the most equitable matter of preserving the status quo, and it would not move to vacate this order.

On August 4, 1975, Southland Royalty Company and El Paso entered into a letter agreement providing protective provisions and other terms for the continued delivery of gas to El Paso. The Mineral Interest Owners explain that due to the large number of people and distances involved the mineral interest owners, other than Southland, have not yet executed a formal document, but have agreed to it in principle.

More specifically, the letter agreement provides that where Southland is compelled to deliver gas to El Paso by Opinion No. 737 or any other order of the Commission or the courts the initial rate shall consist of the higher of 76.5 cents per Mef plus certain adjustments, 150% of the national rate, or any higher rate that El Paso is permitted to pay. If El Paso is prevented from including this cost of gas in its rates, Southland is to refund to El Paso the amount disallowed. In the event Southland prevails upon rehearing of Opinion No. 737 and delivers gas elsewhere and later it is determined that Southland should have continued to make deliveries to El Paso, there are requirements for the payback of volumes of gas to El Paso. In the event that the Commission's determination in Opinion No. 737 is reversed, and it is determined that the gas could have been sold to others than El Paso, there are requirements for the payback of gas by El Paso to Southland similar to those in the Court order discussed above.

El Paso and Southland also agree to request the Commission to include protective payback provisions in its order in accordance with the letter agreement and that these protective provisions shall be the sole measure of damages and liability as between El Paso and Southland. Attached to the letter agreement are general terms and conditions for the delivery of gas by Southland and payment thereafter by El Paso.

In our opinion the letter agreement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips

as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations substituting Southland, Exxon and other parties for those originally serving El Paso, unless permission is obtained from the Commission to abandon the service to El Paso. We observe further that until appropriate rate filings are made by Southland and other mineral interest owners we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the Court order, however, putting in effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its application for rehearing, to cover the period until our order becomes final.

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the application for rehearing filed by Texaco, the Mineral Interest Owners, Exxon, Mobil and Gulf in these proceedings present no facts or legal principles that would warrant any change in or modification of the Commission's Opinion No. 737 and the accompanying order except as provided below.

(2) It is necessary and appropriate in the administration of the Natural Gas Act that the application for rehearing filed by El Paso be granted and that the protective language below be adopted to cover the period until our order becomes final.

The Commission orders:

(A) The applications for rehearing filed by Texaco, the Mineral Interest Owners, Exxon, Mobil, and Gulf are denied; the application for rehearing filed by El Paso is granted.

(B) If Southland, Exxon, or any other mineral interest owners should seek review of this order and upon review it should be ultimately determined that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon, or the other mineral interest owners pending such judicial review shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered pending judicial review shall not prejudice the rights of the mineral interest owners' rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it pending judicial review. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered, in an equitable manner over a reasonable period of time, subject to further Commission order as to scheduling but not as to entitlement if El Paso, Southland, Exxon, and the other mineral interest owners cannot agree as to such scheduling, (b) Southland, Exxon, and the other mineral interest owners shall return to El Paso the monies paid for deliveries made pending judicial review, such repayments to be made within thirty (30) days following the end of each calendar month during which

payback volumes are delivered by El Paso, and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral owners, or any of their customers, shall not subject any of them to Commission jurisdiction.

By the Commission.

[S E A L]

Kenneth F. Plumb,

Secretary.

Appendix E

United States of America
Federal Power Commission

Opinion No. 737-B

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

OPINION AND ORDER GRANTING REHEARING ON LIMITED ISSUE RELATING TO FILING REQUIREMENTS

Issued: December 18, 1975

DC-51

United States of America
Federal Power Commission

Before Commissioners:

Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III,
and James G. Watt.

El Paso Natural Gas Company	Docket No. CP75-209
Texaco Inc.	Docket No. CI75-594

Opinion No. 737-B

OPINION AND ORDER GRANTING REHEARING ON LIMITED ISSUE RELATING TO FILING REQUIREMENTS

(Issued December 18, 1975)

PER CURIAM:

Mineral Interest owners[1] on October 3, 1975, filed an application for rehearing with respect to the Commission's Opinion No. 737-A and Order issued September 3, 1975. In that Opinion the Commission denied rehearing of Opinion No. 737 but adopted protective relief in case the Commission's order was

[1]Southland Royalty Company (Southland) William Y. Penn, *et al.*, Trustees, Nancy Elizabeth Penson, Penn Resources, Inc., Elizabeth Hudson Penn, Trustees under the will of Warren Wright deceased.

reversed on appeal. In Opinion No. 737 the Commission determined that owners holding reversionary interests in certain gas reserves in Crane and Ector Counties, Texas were subject to the dedications made by the leaseholders, Gulf Oil Corporation and others for the sale of gas in interstate commerce to El Paso Natural Gas Company and that, upon termination of the leases, such owners might not sell the dedicated gas in intrastate commerce without obtaining abandonment approval under Section 7(b) of the Natural Gas Act. Mineral Interest Owners contend that the Commission in Opinion No. 737-A erred in holding that deliveries to El Paso must continue to be made by leaseholders Gulf and Phillips until new rate filings are made by Southland, Exxon and other parties unless permission is obtained to abandon service and that the Commission erred in holding that issues were raised by the agreement of August 4, 1975, between El Paso and Southland and cannot be resolved until appropriate rate filings are made.

On October 20, 1975, Texaco, Inc. filed a response to the application of the Mineral Interest Owners for rehearing, which we have accepted as an application for reconsideration as explained in our order of October 31, 1975. In that order we granted rehearing for purposes of further consideration inasmuch as the record had been docketed in the United States Court of Appeals for the Fifth Circuit, depriving us of jurisdiction. However, on November 25, 1975, the Court granted the Commission's motion for a limited remand for purposes of further consideration.

As Mineral Interest Owners point out, we took notice of the Southland-El Paso letter agreement providing protective provisions and other terms for the continued delivery of gas to El Paso. We noted particularly that where Southland is compelled to deliver gas to El Paso by Opinion No. 737 the initial rate would consist of 76.5 cents per Mcf or 150 percent of the national rate. The Mineral Interest Owners object to our concluding language that:

> In our opinion the letter agreement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations substituting Southland, Exxon and other parties for those originally serving El Paso, unless permission is obtained from the Commission to abandon the service to El Paso. We observe further that until appropriate rate filings are made by Southland and other mineral interest owners we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the Court order, however, putting in effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its application for rehearing, to cover the period until our order becomes final.

Mineral Interest Owners believe that this language is confusing as to whether they are required to make rate filings. They also contend that as small producers defined in Section 157.40 of the Commission's

Regulations they are not required to make any rate filings with respect to their deliveries to El Paso.

Texaco, which is plainly not a small producer but holds a reversionary interest in the Ector County leasehold, in its application for reconsideration views the protective orders issued by the Court and now by the Commission as having stayed the jurisdictional findings of Opinion Nos. 737 and 737-A, which would otherwise require filings by Texaco and other producers. It notes that the protective language indicates that the gas at issue can be delivered to El Paso by Texaco and other affected parties during the pendency of review without jurisdictional prejudice to any party's position. In these circumstances Texaco believes that the Commission's Opinion No. 737-A does not require the formal filing of its interim agreement with El Paso. We agree with Texaco's reasoning as applied to the period of the Commission and Court stay. Therefore, it is our opinion that it is not required to make rate schedule or certificate filings with respect to sales from its reversionary interest. The same result would apply to Exxon, which holds a reversionary interest in the Crane County leasehold.

With respect to Mineral Interest Owners, regardless of whether they are small producers, it is our opinion that they are likewise not required to make rate schedule and certificate filings with respect to their sales of gas from the reserves here involved because of the protective orders by us and by the Court as agreed by Texaco. Certain of the owners of reversionary interests have made rate schedule filings of

their interim agreements with El Paso. These filings would, of course, be unnecessary at this time.

The Commission further finds:

Opinion No. 737-A and Order should be modified in accordance with the above discussion.

The Commission orders:

The applications for rehearing of the Mineral Interest Owners filed October 3, 1975, and for reconsideration of Texaco filed October 20, 1975, are granted in accordance with the above discussion.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

Appendix F

Section 7 of the Natural Gas Act of 1938, 52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f, provides in pertinent part:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.
>
> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and

> has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.
>
> In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.
>
> (e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the applica-

tion, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.